FILE COPY

No. 458

MILTON COVERDALE,

vs.

ARKANSAS-LOUISIANA PIPE LINE COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

STATEMENT AS TO JURISDICTION

INDEX.

Subject Index.

Table of Cases Cited.

STATUTES CITED.

IN THE

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION.

IN EQUITY.

No. 615

ARKANSAS-LOUISIANA PIPE LINE COMPANY,
Complainant,

vs.

MILTON COVERDALE, SHERIFF AND EX-OFFICIO TAX COLLECTOR,
Respondent.

STATEMENT REQUIRED BY RULE 12, SECTION 1, OF THE SUPREME COURT.

The appeal herein is from a decree granting a permanent injunction rendered and filed May 22, 1937, by a specially constituted District Court of the United States. (J. C. 266, 28 U. S. C. A. 380.)

Under Sections 238 and 266 of the Judicial Code (28 U. S. C. A. 345 and 380), a direct review is allowed, and a direct appeal may be taken, to the Supreme Court of the

United States upon a decree granting a permanent injunction.

The Statute herein involved is Act No. 6 of the Regular Session of the Louisiana Legislature for 1932. Act No. 6 of the Regular Session of the Louisiana Legislature for 1932 is to be found at page 36 of the Official Edition of the Acts of the Louisiana Legislature passed at the Regular Session for 1932.

The provisions of said Act deemed pertinent are summarized as follows:

Act 6 of 1932 was passed at the Regular Session of the Louisiana Legislature for the purpose of providing additional revenue for the State of Louisiana by levying an excise, license or privilege tax on persons, firms, corporations or associations of persons engaged in certain named businesses.

Section 1 of said Act provides that, in addition to all other taxes of every kind now imposed by law, every person, firm, corporation or association of persons engaged in the business of manufacturing or generating electricity for heat, light or power in the State of Louisiana, shall be subject to the payment of an excise, license or privilege tax of 2 per cent per annum of the gross receipts from the sale of the electricity so manufactured or generated in the State, except the receipts from that portion of said electricity sold for resale.

Section 2 provides that in addition to all other taxes now imposed by law, every person, firm, corporation or association of persons engaged in the business of selling electricity not manufactured or generated by him or it, for heat, light or power in the State of Louisiana, shall be subject to the payment of an excise, license or privilege tax of 2 per cent per annum of the gross receipts from the sale of such electricity not manufactured or generated by him

or it, sold in the State, except the receipts from that portion of said electricity sold for resale.

Section 3 of the Act provides that, in addition to all other taxes of every kind imposed by law, every person, firm, corporation or association of persons engaged in the State of Louisiana in any business or occupation, which person, firm, corporation or association of persons uses in the conduct of such business or occupation, at any time, electrical or mechanical power of more than ten horse power, and does not procure all of the power required in the conduct of such business or occupation from a person, firm, corporation or association of persons subject to the tax imposed by Section 1, or Section 2 of this Act, shall be subject to the payment of an excise, license or privilege tax of One ($1.00) Dollar per annum for each horse power of capacity of the machinery or apparatus known as the "prime mover" or "prime movers," operated by such person, firm, corporation or association of persons, for the purpose of producing power for use in the conduct of such business or occupation; provided that any user of power securing all, or any part of the power required in the conduct of the business or occupation of such user from a person, firm, corporation or association of persons subject to the tax imposed by Section 1 or Section 2 of this Act, shall not be liable for the tax imposed by Section 3, or for a greater tax under this Section 3, as the case may be, because of the employment of stand-by power facilities by such user during the periods of failure of the supply of purchased power; and provided further that any person, firm, corporation or association of persons, the principal use of whose electrical facilities is the generation of electricity for sale, shall not be subject to an additional tax under this Section 3 on the horse power capacity of any machinery or apparatus used in the generation of electricity. Section 3 also provides

for certain exceptions, including the proviso that in computing the tax imposed by Section 3, there shall be excluded from the horse power of capacity of machinery or apparatus operated for the purpose of producing power to be used in propelling or motivating any automobile, truck, tug, vessel or other self-propelling vehicle on land, water or air.

Section 4 of the Act provides that every person, firm, corporation or association of persons keep certain records, and provides for a penalty for failure to comply with the provisions of the Act in this respect.

Section 5 of the Act names the Supervisor of Public Accounts of Louisiana as the authority to collect the tax levied by the Statute.

Sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Act provide for the collection of the tax levied by the Statute and other details pertaining to the enforcement of the provisions of same.

On October 15, 1934, the Arkansas-Louisiana Pipe Line Company, a Delaware Corporation doing business in Louisiana, filed a suit in the Monroe Division of the United States District Court, Western District of Louisiana, which suit bears No. 615 on the Equity Docket of said court, against Milton Coverdale, Sheriff and Ex-Officio Tax Collector for the Parish of Ouachita, Louisiana, who, under Section 8 of the Act involved, is required, under the direction of the Supervisor of Public Accounts, to seize and sell sufficient property of the tax debtor to pay any taxes that may be due by the tax debtor under the Act.

In said proceeding, complainant sought a preliminary injunction, and finally a permanent injunction, enjoining and restraining said Sheriff and Ex-Officio Tax Collector from collecting from complainant any taxes under Act 6 of 1932. Complainant's intrastate operations in Louisiana,

which the State contends makes it liable for the tax levied by said Statute, are that complainant owns and operates ten one thousand horse power internal combustion gas engines, or prime movers, and two two hundred-fifty horse power internal combustion gas engines, or prime movers, at its Munce Station in Ouachita Parish, Louisiana, all of which are used to produce, convert, generate or manufacture mechanical energy from the heat energy in natural gas. Complainant attacked Act 6 of 1932 as being violative of both the Federal and State Constitutions. Among the grounds of attack enumerated in the bill of complaint are the following:

That the Statute contravenes Article 1, Sections 8 and 10 of the Constitution of the United States reserving to the Congress of the United States the sole power to regulate commerce between the several states; that the tax levied by Act 6 of 1932 is a property tax exceeding the rate provided by Article 10, Section 3 of the Constitution of Louisiana for the year 1921, and constitutes double taxation, and is contrary to the provisions of Article 10, Section 1 of the Constitution of 1921; that the Statute in question denies to petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution in that those who purchase power are subjected to a lesser rate of taxation than imposed upon petitioner, the owner of machinery from which the power necessary for the conduct of its business is generated; that the Statute in question denies to petitioner, and those similarly situated, the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution in that it arbitrarily discriminates between petitioner and others similarly situated and between persons and corporations purchasing power in the form of electrical energy in the conduct of similar business enterprises by exempting such other persons and corpora-

tions from the payment of the tax upon engines owned, maintained and used by them as "stand-by" or emergency facilities, when petitioner and those in similar circumstances having and maintaining such "stand-by" or emergency facilities are granted no exemption therefor.

On October 25, 1934, a specially constituted three-judge district court heard the rule to show cause why the interlocutory injunction should not issue as prayed for. The court, on April 15, 1935, granted a preliminary injunction for the reasons stated in the opinion in the case at bar, 17 Fed. Supp. 34, and for the further reasons stated in the opinion rendered on the same day in the case of *Union Sulphur Company* v. *Reid, Sheriff*, involving the same issues and the same Statute, 17 Fed. Supp. 27, with the exception that the latter case did not involve the question of the tax being a direct burden on interstate commerce.

Respondent applied for rehearings in both the case at bar and *Union Sulphur Company* v. *Reid, supra,* which applications were granted. 17 Fed. Supp. 36, 17 Fed. Supp. 32.

On rehearing on the question of whether or not a preliminary injunction should issue, the court, in the case of *Union Sulphur Company* v. *Reid* (opinion filed February 4, 1936, 17 Fed. Supp. 32), upheld the validity of Act 6 of 1932, and refused the issuance of an interlocutory injunction. On rehearing in the case at bar, *Arkansas-Louisiana Pipe Line Company* v. *Coverdale* (opinion filed February 4, 1936, 17 Fed. Supp. 36), a majority of the court held that, in so far as the Arkansas-Louisiana Pipe Line Company is concerned, the tax levied by Act 6 of 1932 is a direct burden on its interstate operations and therefore violative of the commerce clause of the Federal Constitution, and issud a preliminary injunction enjoining the Sheriff and Ex-Officio Tax Collector of Ouachita Parish from collecting said tax from complainant for that reason. One judge dissented, however, and held in a written opinion that the tax levied by

Act 6 of 1932 is not a direct burden on complainant's interstate business, and is not violative of the commerce clause of the Federal Constitution. See *Arkansas-Louisiana Pipe Line Company* v. *Coverdale*, 17 Fed. Supp. 38, opinion filed Feb. 4, 1936. The opinions of the court in these two cases on rehearing, with the exception of the commerce feature in the *Arkansas-Louisiana Pipe Line* case, were based on a decision of the Louisiana Supreme Court in the case of *State ex rel. Porterie* v. *Hunt*, 182 La. 1073, 162 So. 777, 103 A. L. R. 9, rendered subsequent to the first opinions handed down by the court issuing preliminary injunctions.

On February 12, 1937, a specially constituted three-judge district court for the Western District of Louisiana heard the question of whether or not the interlocutory injunction previously issued in the case at bar on the ground that the tax levied by Act 6 of 1932 is a direct burden on interstate commerce, should be made permanent. The Circuit Judge who dissented from the majority opinion holding the tax a direct burden on interstate commerce did not sit when the case was heard on the question of whether or not the preliminary injunction issued by two members of the former court should be made permanent.

The Court, on the merits in the case at bar in an opinion filed May 22, 1937, held the tax levied by Act 6 of 1932, a direct burden on the interstate commerce conducted by complainant and is, therefore, violative of the commerce clause of the Federal Constitution, and by decree signed on May 22, 1937, made permanent the preliminary injunction previously issued.

Cases believed to sustain the jurisdiction are *Safety Deposit Trust Company* v. *Virginia*, 280 U. S. 83; *Provident Savings Association* v. *Kentucky*, 239 U. S. 103; *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421; *Fidelity and Deposit Company of Maryland* v. *Tafoya*, 270 U. S. 426; *Frick*

v. *Pennsylvania*, 268 U. S. 473; *Delaware, L., etc., Railroad Company* v. *Pennsylvania*, 198 U. S. 341; *Louisville, etc., Ferry Company* v. *Kentucky*, 188 U. S. 385; *New York Life Insurance Company* v. *Head*, 234 U. S. 149; *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1; *Looney* v. *Crane Company*, 245 U. S. 178; *Airway Electric Appliance Corporation* v. *Day*, 266 U. S. 71; *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 122; *Cooney* v. *Mountain States Telephone & Telegraph Company*, 294 U. S. 384; *Colgate* v. *Harvey*, 296 U. S. 404; *Stewart Dry Goods Company* v. *Lewis*, 294 U. S. 550.

The date of the decree sought to be reviewed is May 22, 1937, and the date upon which application for appeal was presented was July 26, 1937.

A copy of the opinion delivered upon the rendering of the decree sought to be reviewed is appended hereto. See *Arkansas-Louisiana Pipe Line Company, Complainant*, v. *Milton Coverdale, Sheriff and Tax Collector, Respondent*, opinion filed and decree signed and filed May 22, 1937.

Also appended hereto are copies of the following opinions referred to in this statement:

Union Sulphur Company v. *Reid*, filed April 15, 1935, 17 Fed. Supp. 27;

Arkansas-Louisiana Pipe Line Company v. *Coverdale*, filed April 15, 1935, 17 Fed. Supp. 34;

Union Sulphur Company v. *Reid*, filed Feb. 4, 1936, 17 Fed. Supp. 32 (on rehearing);

Arkansas-Louisiana Pipe Line Company v. *Coverdale*, filed Feb. 4, 1936, 17 Fed. Supp. 36, including dissenting opinion (on rehearing).

E. LELAND RICHARDSON,
Solicitor for Respondent.

EXHIBIT "A".

Filed April 15, 1935.

(17 Fed. Supp. 27.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION.

No. 618. In Equity.

UNION SULPHUR COMPANY, *Complainant*,

vs.

HENRY A. REID, Sheriff and Ex-Officio Tax Collector, *et al.*, *Respondents.*

Mr. Cullen R. Liskow, Lake Charles, Louisiana, for Complainants.

Messrs. Gaston L. Porterie, Attorney General; Justin C. Daspit, Assistant Attorney General; F. A. Blanche, Special Asst. Atty. General, Baton Rouge, Louisiana, for Respondents.

DAWKINS, *J.*:

Plaintiff has attacked the constitutionality of Act No. 5 of the Legislature of Louisiana, for the year 1932, under both the Federal and State Constitutions on the grounds hereinafter discussed. We quote Sec. 3, 6, 7 and 8 of the statute in question as follows:

> "SECTION 3. In addition to all other taxes of every kind imposed by law, every person, firm, corporation or association of persons engaged in the State of Louisiana in any business or occupation, which person, firm, corporation or association of persons uses in the conduct of such business or occupation, at any time, electrical or mechanical power of more than ten horsepower and does not procure all the power required in the conduct of such business or occupation from a person, firm,

corporation or association of persons subject to the tax imposed by Section 1 or Section 2 of this act, shall be subject to the payment of an excise, license or privilege tax of One Dollar ($1.00) per annum for each horsepower of capacity of the machinery or apparatus, known as the 'prime-mover' or 'prime-movers', operated by such person, firm, corporation or association of persons, for the purpose of producing power for use in the conduct of such business or occupation; provided that any user of power securing all or any part of the power required in the conduct of the business or occupation of such user from a person, firm, corporation or association of persons subject to the tax imposed by Section 1 or Section 2 of this act, shall not be liable for the tax imposed by this Section 3, or for a greater tax under this Section 3, as the case may be, because of the employment of stand-by power facilities by such user during periods of failure of the supply of purchased power; and provided further that any person, firm, corporation or asociation of persons the principal use of whose electric facilities is the generation of electricity for sale, shall not be subject to an additional tax under this Section 3 on the horsepower capacity of any machinery or apparatus used in the generation of electricity; and provided further that in computing the tax imposed by this Section 3, there shall be excluded from the horsepower capacity of all machinery and apparatus operated, that part of such capacity used in a mechanical, agricultural or horticultural pursuit, or any other occupation exempt from a license tax under Section 8 of Article X of the Constitution of Louisiana, or in operating a sawmill or a mill for grinding sugar-cane or producing raw sugar, or in conducting any business of selling electricity or any business conducted under any franchise or permit granted by the State of Louisiana or any subdivision thereof, or in propelling or movitating any automobile, truck, tug, vessel, or other self-propelled vehicle, on land, water or air."

"SECTION 6. Every person, firm, corporation or association of persons subject to the tax levied in this

act shall annually, between first day of August and the first day of September, make a true and correct return to the Supervisor of Public Accounts in such form as he may prescribe, showing the gross receipts derived from the sale of electricity manufactured and generated, and the gross receipts derived from the sale of electricity purchased, and the portion of said gross receipts derived from sales to a person, firm corporation or association of persons for distribution and resale, and the value of electricity furnished to any branch of the business of such person, firm, corporation or association of persons, not operating under a franchise or permit from the State of Louisiana, or some subdivision thereof, as the case may be, the horsepower capacity of the machinery or apparatus on which the tax imposed by Section 3 of this Act is computed, in each case during the twelve month period ending on the 31st day of July next preceding the making of such return, and shall pay the tax provided for in this Act, at the time said return is made. All taxes imposed by this Act shall become delinquent on the 1st day of September.

In case of failure to make a true and correct return, as provided in this section, the Supervisor of Public Accounts shall make such return, or cause the same to be made, upon such information as he may be able to obtain, assess the tax due thereon and add a penalty of twenty-five percent (25%) to the amount of the tax for failure of the taxpayer to make the return.

That if the excise, license or privilege tax due as hereinabove provided is not paid at the time or in the manner specified, by the person, firm, corporation or association of persons owing the same, then the Supervisor of Public Accounts shall make in any manner feasible, and cause to be recorded in the mortgage records of the Parish where such person, firm, corporation or association of persons is engaged, occupied or continuing in a business or occupation subject to the tax imposed by this Act, a statement, under oath, showing the amount of the tax due by each such person,

firm, corporation or association of persons, which statement when filed for record shall operate as a first lien, privilege and mortgage on all of the property of the respective excise, license or privilege tax debtors as the case may be, and said property shall be subject to seizure and sale for the payment of said excise, license or privilege tax due."

"SECTION 7, whenever the Supervisor of Public Accounts shall cause the statement provided for in the preceding section to be recorded, he shall give notice to the tax debtor by registered letter of the recordation of such statement, and fifteen (15) days thereafter the said Supervisor of Public Accounts shall cause the sheriff and ex-officio tax collector of said parish to seize and sell for the payment of such excise, license or privilege taxes any property whatsoever belonging to the said tax debtor or debtors, as provided above, which may be found within the jurisdiction of the said sheriff and ex-officio tax collector."

"SECTION 8. The Sheriff and ex-officio tax collector of any parish when requested by the Supervisor of Public Accounts, is hereby required to seize and sell any property, assets and effects belonging to any person, firm, corporation or association of persons owing the excise, license or privilege tax herein provided for after the recordation of the statement hereinabove provided and required and after the notice hereinabove provided for has been given; and all such seizures and sales shall be conducted in the manner and form now required for the sale of similar property for taxes and penalties shall be imposed and collected as provided by the general license laws of this State.

Any and all physical property or assets or things of value belonging to the said tax debtors are hereby declared to be subject to seizure and sale for the payment of the excise, license or privilege tax herein provided for in preference to any and all other claims, liens and privileges."

Petitioner alleges that in the conduct of its business of drilling for the production of oil and gas, engines or "prime movers", as defined in said Act are used and that it does not procure any part of its power from others subject to the tax imposed by Section 1 of the Act, that is, those engaged in the production of power for sale. It further alleges that on September 4, 1934, the Supervisor of Public Accounts caused to be filed in the mortgage records of Calcasieu Parish a statement for the period from August 1, 1932 to and including July 31, 1934, claiming $9,601.50 as due by petitioner, and on October 23rd of the same year notified plaintiff, in accordance with Section 7 of the Act, that unless the same was paid within fifteen days, she would cause the sheriff and tax collector to seize and sell the property of the defendant to satisfy said tax, penalties and costs.

The grounds upon which the tax is assailed are as follows:

(1) That although called a license or excise tax, it is in reality an *ad valorem* or property tax, which exceeds the permissible limit fixed by Section 3 of Art. X of the State Constitution; and,

(2) The procedure prescribed for its collection does not afford due process under the Fourteenth Amendment to the Federal Constitution.

Petitioner further alleges irreparable injury and that no provision exists under the law to recover the amount claimed if paid under protest.

Jurisdiction is invoked under Section 266 of the Judicial Code (U. S. C., Title 28, Sec. 380).

Defendant has moved to strike paragraphs 8, 9, 10, 11, 15, sub-section (a) of paragraph 21, sub-sections (a), (b), (c) of paragraphs 25 and 30 of the bill, on the grounds that they amount to "conclusions of law" and "conclusions of fact", which are "contrary to the rules of pleading and practice of this court." They also answered admitting that the tax had been demanded and would be collected in the manner alleged, but otherwise in the main denied the conclusions of law and fact of the petition. They prayed that plaintiff's demand be rejected.

The application for preliminary injunction was heard by this statutory court of three judges on November 23, 1934, and on December 10th defendants filed a motion to dismiss, setting up a statute passed at an extra session of the State Legislature on December 6th of the same year, as granting a right to sue the State to recover back the taxes if found to have been illegally paid, and which it is claimed provides an adequate remedy at law.

We find nothing to sustain the contention that plaintiff could not allege or quote the provisions of the statute assailed, or that the conclusions of law or fact were improperly pleaded. No authority has been cited in support of the contention and the motion will be denied.

As to the Act of Legislature of December 6th, passed after the filing and submission of the case, there was no such remedy under the state law when the suit was filed and the matter must be governed by conditions which existed at that time. If there was no adequate remedy then, the subsequent passage of the statute in question did not have the effect of divesting this court of the jurisdiction which it had acquired even if the Act can be construed to afford such relief, as to which we express no opinion at this time. Beedle *v.* Bennett, 122 U. S. 71; Busch *v.* Jones, 184 U. S. 598; Dawson *v.* Kentucky Distillers Company, 253 U. S. 296.

We find the pertinent facts as follows:

Plaintiff is engaged in drilling wells in this State in search of and for the production of oil, gas and other minerals, and the "prime movers" or engines, whose horse power forms the basis for the tax, are used exclusively for those purposes. It produces no power for sale, nor does it purchase any from anyone else. It had been duly assessed and paid its property or *ad valorem* taxes, up to the full constitutional and statutory limit, upon the engines in question, and made no return as to the tax in contest, as required by the statute assailed. The Supervisor determined a tax liability for the period in question of $9,601.50, filed the statement in the mortgage records, caused the required notice to be sent and would have proceeded with the enforced collection as provided by the statute but for the

preliminary restraining order issued herein. At the time of filing this suit there was no provision in the Act itself or otherwise in the state law under which the plaintiff could have paid the tax under protest and then sued for its recovery; but since the writ was issued, the Legislature has passed an act purporting to give such a remedy.

Conclusion of Law.

The general property tax is imposed and limited by Section 3, Article X of the State Constitution, which we quote, as follows:

> "The rate of State taxation on property for all purposes shall not exceed in any one year, five and one-quarter mills on the dollar of its assessed value; provided, the Legislature may, by a vote of two-thirds of the members elected to each house, increase such rate to not more than five and three-quarter mills on the dollar."

We also quote Section 8 of Article X, with respect to license taxes:

> "SECTION 8. (As amended by Act 77 of 1934.) License taxes may be levied on such classes of persons, associations of persons and corporations pursuing any trade, business, occupation, vocation or profession, as the Legislature may deem proper, except clerks, laborers, ministers of religion, school teachers, graduated trained nurses, those engaged in mechanical, agricultural or horticultural pursuits or in operating sawmills. Such license taxes may be classified, graduated or progressive. No political subdivision shall impose a greater license tax than is imposed for State purposes, provided that this restriction shall not apply to dealers in malt, vinous, distilled, alcoholic, spiritous or intoxicating liquors; but when an income tax is levied by the State, in lieu of State license taxes, this shall not prohibit the levy by the political subdivisions of the State of such license taxes as the Legislature may authorize. Those who pay municipal license

> taxes equal in amount to such taxes levied by the parochial authorities shall be exempt from such parochial license taxes."

As was said in Dawson *v.* Kentucky Distillers Company, *supra*, the question of whether this is a property tax or a license tax is one of local law, the construction of which by the court of last resort of the state would be accepted by this court as conclusive. However, no such decision having been made, we are bound to determine this matter ourselves. In Lionel's Cigar Store *v.* McFarland, 162 La. Rep. 31, 111 So. 599, the Supreme Court of Louisiana construed the statute imposing a license tax on tobacco and tobacco products, and while some of the language of that statute gave it the appearance of a property tax, it was held to be a license tax "upon dealers", measured by the price or amount for which the merchandise was sold at retail. In the course of that opinion, the court had this to say:

> "The incident or fact that makes the tax a license tax and not a property tax, is that it is not levied on or collectible from the owner of the property unless he is *engaged in the business* of selling it at retail, and it is levied and collected, then only in proportion approximately, to the amount of the retail sales". (Italics by writer of this opinion.)

To the same effect see Fleischman Company *v.* Conway, 168 La. 547, 122 So. 845, wherein it was again found that the tax in reality was imposed upon "dealers in yeast".

The present statute, at the beginning of Section 3, assailed here, says that the tax is imposed upon "every person, firm, or corporation or association of persons engaged in the state * * * *in any* business or occupation which * * * *uses* in the conduct of said business or occupation" such power. It would have meant the same thing, we think, if it had left the words "any business or occupation" out and simply said that the tax should be collected from anyone using such power, for it is perfectly clear that the tax is not upon the business but upon the use of the power. This idea is further reinforced by the

title, which, after declaring the object of the statute to be the "levying an excise license or privilege tax on persons * * * engaged *in the* business of manufacturing or generating or selling electricity * * *", adds "and on persons * * * engaged in certain other businesses or occupations *using* electricity or mechanical power * * * *". The first clause of this title clearly expresses the purpose to impose a license tax upon one class of business, to-wit: that of producing electricity for sale; whereas, the succeeding clause states it is to be imposed upon anyone who uses power in any kind of business or occupation, regardless of its nature, save the excepted classes (where it is used in horticultural, mechanical or agricultural pursuits which are exempted by Sec. 8, Art. X of the State Constitution from license taxes). There is patently no attempt to classify the many different kinds of businesses which may use such power or to grade the tax according to the volume or amount of business done or power consumed, as seems to be contemplated by Section 8 of Article X of the State Constitution, and as had been done uniformly in statutes imposing license taxes in the past.

As was also pointed out in Dawson *v.* Kentucky Distillers Company, *supra,* the tax is imposed upon the one thing which makes the property valuable, to-wit, its use, whether owned, leased or what not; it may be owned, sold, or leased without incurring the tax, provided it is not used, but the moment anyone uses it, the tax becomes due and is subject to enforcement through the recording and execution of a lien against the machinery. The result is no different to what it would be if the tax were laid upon the number of cylinders or pistons. It is the same in amount whether the engine is used one hour or every day in the year, to-wit, $1.00 per horse power for the year.

Ad valorem taxes are levied upon specific property, usually assessed to the owner and collected through the summary process of seizure and sale. The present tax is required to be realized in the same way, and in addition to the usual lien against the specific property resulting from the filing of the tax roll, there is created against all of the property of the tax debtor a similar lien, for the

recovery of which suit is not to be brought as required with respect to other license taxes, but must be enforced in the manner above stated. We are, therefore, constrained to hold that it is a property tax.

We also think the Act violates the due process clause of the 14th Amendment to the Federal Constitution, in that it makes no provision for a hearing or review of the action of the Supervisor in determining the tax, as will be seen from Section 7, quoted above. It will be noted that that section merely requires the giving of notice "of the recordation of such statement" after it has become a lien upon the property "and fifteen days thereafter" the supervisor must "cause the sheriff to seize and sell the property", with no provision anywhere in the act or any other law of the State for a hearing as to its correctness. To be of any value, the notice must have some purpose other than simply to permit the payment of the tax so determined to avoid the seizure of the property. When the amount has been determined in the manner provided by the statute, without previous notice and recorded, nothing is left to the Supervisor but to give notice and enforce collection in the manner stated, for she is given no authority to hear or determine complaints by the taxpayer and hence no opportunity to be heard by the latter. Central of Georgia Railway Co. *v.* Wright, 207 U. S. 127; Jackson Lumber Company *v.* McCrimmon, 164 Fed. 759; and when the penalties are so severe "as to deter him, (the taxpayer) from asserting that which he believed to be his right," this within itself is a denial of due process and the equal protection of the law. Wadley Southern Railroad Co. *v.* Georgia, 235 U. S. 218. The statute under consideration here imposes a penalty of twenty-five percent "for failure of the taxpayer to make the return" and the recordation of the statement creates a lien, not alone upon the machine or "prime mover", but "on all of the property * * * of the tax debtor" and is so harsh as to fall under the principle of the case just cited.

Our conclusion is that for the reasons stated a preliminary injunction should be granted.

(Signed) RUFUS E. FOSTER,
U. S. Circuit Judge.

(Signed) BEN C. DAWKINS,
U. S. District Judge.

(Signed) WAYNE G. BORAH,
U. S. District Judge.

EXHIBIT "B".

Filed April 15, 1935.

(17 Fed. Supp. 34.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION.

No. 615. In Equity.

ARKANSAS-LOUISIANA PIPE LINE COMPANY, *Complainant,*

vs.

MILTON COVERDALE, *Sheriff and Ex-Officio Tax Collector, Respondent.*

Messrs. Blanchard, Goldstein, Walker & O'Quin, Robert Roberts, Jr., Shreveport, Louisiana, for Complainant.

Mr. Justin C. Daspit, Baton Rouge, Louisiana, for Respondent.

DAWKINS, *J.:*

In this case, identical provisions of the Act, No. 6, of the Louisiana Legislature for the year 1932, are attacked as unconstitutional for the same reasons urged in the case of Union Sulphur Company *v.* Reid, Sheriff and Tax Collector, *et al.*, No. 618 in Equity, this day decided, and on the addi-

tional ground that they impose an undue burden upon interstate commerce. Defendant has filed an exception of nonjoinder, in that the Supervisor of Public Accounts was a necessary and indispensable party defendant; and otherwise opposed the granting of the preliminary injunction upon the same grounds.

Decisions of the state court have repeatedly held that the validity of a tax may be contested against the sheriff and tax collector alone where he was proceeding to sell property in execution of a tax lien. K. C. S. Railway Co. *v.* Skinner, 145 La. 25, 81 So. 743; L. & A. Ry. Co. *v.* Tax Collector, 121 La. 997, 46 So. 994; Board of Trustees of Centenary College *v.* Sheriff, 128 La. 257, 54 So. 790; Bud *v.* Houston, 36 An. 959; see also U. S. *v.* Lee, 106 U. S. 195.

The plaintiff in this case, like the Union Sulphur Company in No. 618, failed or refused to make a return, and the Supervisor determined the tax to be $7,316.00, for the period ending July 31, 1933, added thereto 25% penalties under the statute and 10% attorney's fees, recorded a statement thereof as provided by the statute and had the sheriff seize and advertise the property of defendant for sale. The latter then filed suit in the state court, seeking to enjoin the sheriff and Supervisor of Public Accounts from selling its property, alleged to be worth $800,000, upon substantially the same grounds as urged here. The latter excepted to the jurisdiction of the district court for Ouachita Parish, on the ground that she should have been sued in the Parish of East Baton Rouge, her official domicile, and the place where she discharges her duties. The exception to the jurisdiction was overruled by the trial court and the Supervisor applied to the State Supreme Court for a writ of prohibition, which was granted, with a stay order and the trial judge was ordered to send the record up. This had the effect of releasing the sheriff and Supervisor from the effects of the restraining order granted by the lower court and they proceeded again with the advertisement of the property for sale; whereupon the plaintiff sought relief in this court in the present action. Upon the hearing by the Supreme Court of its supervisory writ thus granted, the stay order was recalled (after the present suit had been filed) and in

passing upon the plea as to the jurisdiction, the court had this to say:

"The ruling of that court in maintaining its jurisdiction is sanctioned by reason and supported by precedent. Plaintiff is engaged in business in the Parish of Ouachita and its property is there. The lien is recorded there and there it has effect against the property of the alleged debtor, and it is there that an attempt is being made to enforce it. The method set up by the act to enforce payment of the tax is the seizure and sale of the property of the tax debtor, and if a sale is made, it must be made where the property is situated. In sum, the enforcement or execution of the lien which came into existence by virtue of the recorded sworn statement made by the Supervisor of Public Accounts must take place in the Parish of Ouachita, where the property is situated.

It is alleged, and not denied, that if the sheriff of Ouachita Parish is not restrained by the Court, he will sell Plaintiff's property, and it is alleged that a sale of plaintiff's property under this process will result in irreparable injury to it. It is manifest that plaintiff's only remedy was to enjoin the executing officer, the sheriff, from making the sale. The real object of the suit, therefore, was to obtain the injunction and the issue as to the validity of tax was raised by the injunction."

It then proceeded to cite and analyze numerous decisions, sustaining the jurisdiction of the lower court where the property was situated, and finally concluded:

"The reason for the rule is that when property is seized and about to be sold under process of this kind, the alleged debtor must arrest the sale in order to obtain relief, for if he allows his property to be sold and the tax collected, he has no remedy under the act to recover the amount, even if the tax should be held to be illegal. The suit for injunction is, therefore, the main demand and the invalidity of the tax is plead as

a ground for the injunction. The court of East Baton Rouge Parish, where the Supervisor has her official domicile, would have no jurisdiction to arrest a sale about to take place in Ouachita.

If the sole purpose of the suit had been to reduce the assessment made by the Supervisor, or to correct it, the court at her domicile would have had jurisdiction, because she made the assessment there, and, if a change should be made, she would have to make it there, and the suit should be brought where she performs her official functions. N. O. G. N. R. R. Co. *v.* Thomas, Assessor, *et als., supra.*

But in this case, the Supervisor did more than make the assessment; she caused it to be filed and recorded in the Parish of Ouachita, where the property affected is situated, and caused the sheriff to seize and advertise it for sale."

We find the facts as follows:

Plaintiff is engaged in the transporting of natural gas purchased in this State from producers, and 96.6% of which is carried by pipe line into and sold in the states of Texas and Arkansas. The engines or "prime movers" are used in compressor stations for pumping said gas through its lines. Having failed to make a return, the Supervisor determined the amount of the tax to be $7,316.00, added thereto the penalty of 25%, as well as 10% attorney's fees on the whole, recorded a statement thereof in the mortgage records and caused the sheriff and tax collector to sieze and advertise for sale property valued at several hundred thousand dollars, in satisfaction thereof. Thereupon this suit was filed and a restraining order granted under the circumstances above set out.

The defenses are substantially the same as in the case of Union Sulphur Company against Reid, Sheriff and Tax Collector, No. 618, this day decided.

Conclusions of Law.

We are of the view that the tax is invalid for the reasons given in the opinion of the Union Sulphur Company case, and also because it imposes an undue burden upon interstate commerce. The engines driving the pressure pumps which force the gas through the lines into other states are just as much instruments of interstate commerce as are the locomotives of an interstate railroad or the motive power of a ferry-boat operating across a river separating two states. So that even if the tax could be held a license tax it could not be sustained as to the business in which plaintiff is engaged. Helson *v.* Kentucky, 279 U. S. 245; Sprout *v.* South Bend, 277 U. S. 163; Glouster Ferry Co. *v.* Pennsylvania, 114 U. S. 196; Pickard *v.* Pullman Car Company, 117 U. S. 34; see also State Tax Commission *v.* Interstate Natural Gas Company, 284 U. S. 41; Pennsylvania *v.* West Virginia, 260 U. S. 553; West *v.* Kansas Natural Gas Company, 221 U. S. 229; Pennsylvania Gas Company *v.* Public Service Commission, 252 U. S. 23.

For the reasons assigned, the preliminary injunction will be granted.

RUFUS E. FOSTER,
U. S. Circuit Judge.
BEN C. DAWKINS,
U. S. District Judge.
WAYNE G. BORAH,
U. S. District Judge.

EXHIBIT "C".

Filed February 4, 1936.

(17 Fed. Supp. 32.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION.

No. 618. In Equity.

THE UNION SULPHUR COMPANY, *Complainant,*

vs.

HENRY A. REID, Tax Collector, *et al., Respondents.*

Mr. Cullen R. Liskow, Lake Charles, Louisiana, for Complainant.

Messrs. Gaston L. Porterie, J. C. Daspit, Fred A. Blanche, E. L. Richardson, Baton Rouge, Louisiana, and Mr. C. V. Pattison, Lake Charles, Louisiana, for Respondents.

Before Hutcheson, Circuit Judge, and Dawkins and Borah, District Judges.

DAWKINS, *District Judge:*

A re-hearing was granted in this case because, after our original opinion was handed down, the Supreme Court of the State, in State *ex rel.* Porterie *et al. v.* H. L. Hunt, Inc., 182 La. 1073, 62 So. 777, held the tax in question to be a license or privilege tax rather than a property tax, contrary to the conclusion reached by us at the first hearing. It also decided that the Act levying the tax did not violate provisions of the State Constitution upon the same grounds as urged here. We are bound by those interpretations. Lawson *v.* Kentucky Distilleries, 255 U. S. 296. However, in argument and brief on the rehearing, counsel for complainant has contended that we are not bound by

that decision, if the tax, in its operation and effect, is in reality a property tax, and it is our duty to examine it to see whether in its results it imposes the tax burden upon the thing itself. Plaintiff relies mainly upon the case of Dawson *v.* Kentucky Distilleries, *supra*, but in that case it was distinctly held that the question of whether the tax was a property or license tax, was "one of local law, so that a decision of it by the highest court of the State would be accepted by us as conclusive." Its validity had not been passed upon by the Kentucky court of last resort. Then again, as pointed out by the Louisiana Supreme Court, no use whatever could be made of the liquors without removal from the bonded warehouses, and before this could be done the tax had to be paid; whereas, under the Louisiana Statute, the tax itself does not become due unless and until the engines are used in producing power, and then they are to be paid by whomever uses them, whether owner, lessee or anyone else. We do not find anything in the present case which justifies us in disregarding the interpretation put upon the law by the highest court of the State, and leave the tax in the category in which that court has placed it, to-wit, an "excise", "license", or "privilege" tax.

The only remaining questions are as to whether the statute violates the provisions of the federal Constitution, as alleged, guaranteeing due process and equal protection of the law.

The alleged basis of discrimination or denial of equal protection is, first, that it is a property tax which is not imposed upon those using such machinery in mechanical, agricultural or horticultural pursuits, or in propelling vehicles or vessels upon land or water, or in the air; or upon machinery using less than ten horse power. As pointed out in the decision of the State court, such taxes may be imposed upon different classes of persons, and they do not violate the equal protection provision of the federal Constitution, if there be a reasonable basis for distinction between such classes. In the present instance, the primary purpose of the statute appears to have been to impose a license tax upon the production and use of power. The

first section makes a levy of 2% on those "engaged in the business of manufacturing or generating electricity, for heat, light or power"; and Section 2 imposes the same percentage upon those "engaged in the business of selling electricity not manufactured or generated by them"; whereas, Section 3 levies the tax complained of in the present case upon persons who use mechanical or electrical power "in the conduct of such business or occupation" as may be followed or pursued by them, and who do not "procure all of the power required" in the conduct of such business from the classes in Sections 1 and 2. Thus there is a classification of the persons taxed as between those who manufacture, who sell and who produce their own power and the tax is equal upon all those who fall in each class. Section 8 of Art. X of the State Constitution exempts from license taxes those engaged in manufacturing, agricultural and horticultural pursuits, along with certain others, and it is well settled that a State may classify businesses, professions or occupations for license tax purposes, and impose different kinds and rates upon each, or none if it sees fit, so long as there is sufficient difference to form a reasonable basis for classification. What has been done in this case, we think, in view of the holding of the State Court that it is a license tax, comes within the purview of that doctrine. C. J., Vol. 61, verbo Taxation, Sec. 35.

A further consideration of the remaining issue of due process under the federal Constitution, convinces us that we were in error in holding that the method provided by the statute for collection did not afford the taxpayer an opportunity to be heard before paying the tax. The Supreme Court of the United States, in the case of McMillen *v.* Anderson, 95 U. S. 41, in dealing with a similar statute, had this to say:

> "Looking at the Louisiana statute here assailed—the act of March 14, 1873—we feel bound to say, that, if it is void on the ground assumed, the revenue laws of nearly all the States will be found void for the same reason. The mode of assessing taxes in States by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual.

By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done.

But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding. The nation from whom we inherit the phrase 'due process of law' has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it, the statute under consideration does not violate it. It enacts that, when any person shall fail to (or) refuse or (to) pay his license tax, the collector shall give ten days' written or printed notice to the delinquent requiring its payment; and the manner of giving this notice is fully prescribed. If at the expiration of this time the license 'be not fully paid, the tax-collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property' of the delinquent, or so much as may be necessary to pay the tax and costs.

Another statute declares who is liable to this tax, and fixes the amount of it. The statute here complained of relates only to the manner of its collection.

Here it is notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the States now have boards of revisers of tax assessments does not prove that taxes levied without them are void.

* * * * * * *

But however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the proceedings

for its collection by process of injunction. See Fouqua's Code of Practice of Louisiana, Arts. 296-309, inclusive. The act of 1874 recognizes this right to an injunction and regulates the proceedings when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction.

But it is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the Constitution which requires such a bond as a condition precedent to its issue.

It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the Court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process being used to work gross injustice to another."

See also Pullman Company *v.* Knott, 235 U. S. 23, wherein it was held by failing to make the return required by the statute, the taxpayer had lost his right to be heard.

For the reasons assigned, the preliminary injunction should be denied.

Proper decree should be presented.

EXHIBIT "D".

Filed February 4, 1936.

(17 Fed. Supp. 36.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION.

No. 615. In Equity.

ARKANSAS-LOUISIANA PIPE LINE COMPANY, *Complainant,*

vs.

MILTON COVERDALE, Sheriff and Tax Collector, *et al.*, *Respondent.*

Messrs. Blanchard, Goldstein, Walker & O'Quin, Robert Roberts, Jr., Shreveport, Louisiana, for Complainants.

Messrs. A. L. Davenport, J. B. Dawkins, Monroe, Louisiana; Gaston L. Porterie, J. C. Daspit, Fred A. Blanche, E. L. Richardson, Baton Rouge, Louisiana, for Respondents.

Before Hutcheson, Circuit Judge, and Dawkins and Borah, District Judges.

DAWKINS, *District Judge:*

A rehearing was also granted in this case because of the decision of the Supreme Court of the State in State *ex rel.* Porterie *et al. v.* H. L. Hunt, Inc., 182 La. 1073, 162 So. 777, holding the tax in question to be a license rather than a property tax. We are bound by that conclusion. (Dawson *v.* Kentucky Distilleries, 255 U. S. 296.) However, this still leaves in this case the question as to whether, as a license tax, it imposes an undue burden on interstate commerce. That natural gas, as well as crude oil are commodities, which under proper circumstances become a part of such commerce, hardly needs the citation of authority. See West *v.* Kansas Natural Gas Company, 221 U. S. 229; Pennsylvania

Gas Co. *v.* Public Service Commission, 252 U. S. 23; Pennsylvania *v.* West Virginia, 262 U. S. 553. As stated in our former opinion, the plaintiff purchases its gas from producers in the Monroe and Richland fields, which passes through gathering systems to its pumping station at Munce, whence it is transported by the pressure of the pumps or machinery whose horse power is the subject of this license tax, to other states. From the moment of its acquisition through the metres in the field into the gathering lines, 96.6% of its volume starts on its journey by way of the pumping station and the twenty inch main into other states. The pumps or compressors are instrumentalities used to effectuate or accomplish that journey—in fact, without them transportation of the gas in required quantities when the rock pressure is low, could not be made, since it is a substance which cannot be handled like crude oil, grain, etc. These engines, therefore, become the real and only motive power for its movement in interstate commerce. It is argued that the tax is laid upon the business of using or in business which uses power-producing engines rather than upon the machinery itself and that contention was sustained by the State court to distinguish it from a property tax. Having thus determined it to be a license tax upon a business or occupation, then it would seem clear that the business of this defendant cannot be carved into separate parts and a tax imposed upon one of those parts without affecting the other. It is a single entity, to-wit, the business of purchasing gas in one state and selling it in another, and in order to do so, plaintiff must use this machinery as a means of transportation.

Much reliance is placed upon the case of Utah Power & Ligh- Company *v.* Pfost, 286 U. S. 165. However, the Supreme Court there found there was a distinction between the two operations of the defendant company, to-wit, the manufacturing and transporting and sale of electrical power. The tax was levied upon the manufacturing. The plaintiff had a plant whose turbines were turned by water power, and which in turn converted that power into electrical energy before it was possible to transport it out of the state. The first operation, the court said, was manufacturing, subject to

local regulation and state control, notwithstanding, the energy after production, was transmitted instantaneously over wires to other states. There is no such condition in the present case, as the gas is gathered and transported in its original state, just as a freight train might pick up carloads of cotton at stations on a railroad line and carry them into other states; and if this tax can be imposed according to the number of horse power of the engines, there could be no rational reason why it could not likewise be done on the basis of number of feet or miles of pipe used. In State Tax Commission of Mississippi *v.* Interstate Natural Gas Company, 284 U. S. 41, the State had imposed a license or privilege tax "upon each person engaged or continuing in the business of operating a pipe line or transporting in or through the state oil or natural gas, through pipes." The tax was measured and graded according to the number of miles and size of pipe so used. The gas was purchased from producers in Louisiana and transported and sold in Mississippi. The gas company sold to consumers in Louisiana from 70 to 75 millions cubic feet per day and to those in Mississippi from 204 million to 520 million feet per day, and in holding the tax unconstitutional, the Supreme Court, in part, had this to say:

> "The gas flows continuously from the gas fields in Louisiana and obviously for much the greater part at least, in interstate commerce. But the appellees rely upon business done under two similar contracts made in New York, to show that there was intra-state commerce in Mississippi that may be taxed without burdening the main activity that the State cannot touch. * * * Distributing companies tap the plaintiff's pipe near Natchez and the town of Woodville. The gas withdrawn by the distributors is measured by a thermometer and a meter furnished by the plaintiff, which is the only way in which it can be measured. The pressure of the gas is reduced by the plaintiff before it passes into the purchaser's hands. The work done by the plaintiff is done upon the flowing gas to help the delivery and seems to us plainly to be incident to the interstate commerce between Louisiana and

Mississippi. The plaintiff simply transports the gas and delivers it wholesale not otherwise worked over than to make it ready for delivery to the independent parties, who dispose of it by retail."

The judgment of the lower court holding the tax illegal as imposing an undue burden upon interstate commerce was affirmed. If a license tax, measured by the number of miles and size of the pipe used, constituted a burden upon the interstate commerce of transporting and selling the gas, how can it be said that a similar license tax, determined by the horse power of the engines used in propelling it through such pipes, is not likewise a burden upon such commerce? We are unable to see any distinction.

Another case which appears clearly applicable in principle, is that of Cooney *v.* Mountain States T. & T. Co., 294 U. S. 384. There the State of Montana imposed a license or occupation tax upon everyone "engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State * * * for each telephone instrument used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all or any part of the calendar year", beginning at ten cents per instrument and increasing according to the number so used, up to one dollar. The tax was assailed as imposing a burden on the interstate business of the plaintiff. Plaintiff owned 34,000 telephones and of these "more than 10,000 have actually been used in interstate and foreign commerce * * *; plaintiff pays the usual property taxes in Montana and also the corporation license or occupation taxes, which are a percentage of its intra-state revenues * * *." It was contended the tax was imposed solely upon intra-state commerce and that it did not burden interstate commerce. However, the court found that the manner in which the tax was imposed, based upon the number of instruments, a large proportion of which were used in interstate commerce, necessarily caused it to operate upon an instrumentality used in interstate commerce; and since no means were provided in the law for separating the two

kinds of business, that is intra and inter-state, it would have to be held invalid as a whole, when applied to the business of the plaintiff. Here again we can see no distinction between a license tax based upon the number of telephones used, regardless of the frequency thereof, or revenue produced, and a similar tax gauged according to the horse power of engines likewise used for propelling natural gas through an interstate pipeline. There the telphones were used in the interstate commerce of communication; whereas, here, the engines are employed in the interstate transportation of natural gas to consumers in other states.

Our conclusion is that the tax assailed in the present case imposes an undue burden upon interstate commerce and is, therefore, invalid as to this complainant. A preliminary writ of injunction should issue.

Proper decree should be presented.

HUTCHESON, *Circuit Judge*, dissenting:

The primary purpose of the statute appears to have been to impose a license tax upon the production of power. It thus imposed not a property, but an excise or privilege tax. Union Sulphur Co. *v.* Reid, this day decided. State *ex rel.* Porterie *v.* Hunt, 62 So. 777; Brumley *v.* McCaughan, 290 U. S. 124.

The majority concludes that because the tax is a privilege, and not a property tax, and falls on the generation by complainant of power, used in part to gather gas into, and in part to transport it through its transportation lines, it is a direct, an undue burden on interstate commerce. I do not think so.

The majority considers the tax a license tax upon the business or occupation of transporting gas in interstate commerce; that is, the business of purchasing gas in one state and selling it in another. I do not think so. If I could agree that the tax was occupational, levied on the general business of complainant, that of acquiring and conducting gas interstate, I could agree with the majority that the case is ruled by Cooney *v.* Mountain States T. & T. Co., 294 U. S. 384, and that the tax is invalid. I cannot, however, agree to this. I think it quite plain that the tax is not

imposed on complainant as a license tax, for the general privilege of transacting its business. It is exacted as a specific privilege tax, for the privilege of generating power in the State. It does not at all fall upon or condition its privilege of conducting the business of transporting gas interstate.

In the Cooney case this distinction is made clear. There it is said "There is no question that the State may require payment of the occupation tax from one engaged in both intrastate and interstate commerce." c/f East Ohio Gas Co. *v.* Tax Commission, 283 U. S. 465." But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce, or the privilege of engaging in it."

The statute under attack here does not undertake to, it does not, lay a tax upon the business which constitutes interstate commerce, or the privilege of engaging in it. It exacts of complainant, who is engaged in both intra and interstate commerce, as well as of all others in the State of Louisiana similarly situated as to the use of prime movers, a privilege tax upon the generation of power in Louisiana. The uses of that power are not taxed. The business in which the power is generated is not taxed. The generation of the power, and that alone, is taxed. The measure of it is the horse power capacity of the "prime movers" employed to generate it.

The majority regards as inapplicable Utah Power & Light Co. *v.* Pfost, 286 U. S. 165. I think that case controlling. There the generation of electrical energy which was the subject of the tax was followed immediately by its transmission to other states. Here, as there, the tax is upon the production of energy. Here, as there, that production is taxable, for here, as there, the tax is laid on the manufacture or production of energy, and not on its transfer or conveyance to distant states. Here, as there, the tax is laid upon the generation of power as a distinct act of production, and without regard to its subsequent use. Here, as there, so far as complainant produces energy in Louisiana, its business is purely intrastate, subject to State taxation and control. It is only in transmitting gas across

the State lines by the use of this power that defendant is engaged in interstate commerce.

Other cases supporting this view are, Oliver-Iron Mining Co. *v.* Lord, 262 U. S. 172; Hope Natural Gas Co. *v.* Hall, 274 U. S. 284; Coe *v.* Errol, 116 U. S. 517; c/f Federal Compress Warehouse Co. *v.* McLean, 291 U. S. 17; Carson Petroleum Co. *v.* Vial, 279 U. S. 95; Schechter Poultry Corp. *v.* United States, 295 U. S. 495.

I am also of the opinion that defendant is right in its contention that if the tax may be held to be on interstate commerce, it falls on it not directly, but indirectly and therefore does not violate the Commerce Clause. Port Richmond *v.* Board of Chosen Freeholders, 232 U. S. 317; Wiggins Ferry Co. *v.* East St. Louis, 170 U. S. 365; State *v.* Albert Mackie, 144 La. 339; Krauss Lumber Co. *v.* Board of Assessors, 148 La. 1057; Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68; Hump Hairpin Mfg. *v.* Emerson, 258 U. S. 290.

When a tax is as here levied on all similarly situated, and in terms is not upon the business done, so that it appears on the face of the statute that "it is clear that it is not imposed with the covert purpose, or with the effect to defeat constitutional rights", Hump Hairpin Mfg. Co. vs. Emerson, *supra,* it is not a prohibited burden on interstate commerce. It is a valid exercise of the power of the State to tax.

With respect, therefore, I dissent.

EXHIBIT "E".

Filed May 22, 1937.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION.

No. 615. In Equity.

ARKANSAS-LOUISIANA PIPE LINE COMPANY, *Complainant,*

vs.

MILTON COVERDALE, Sheriff and Tax Collector, *Respondent.*

Messrs. Blanchard, Goldstein, Walker & O'Quin, Shreveport, Louisiana, for Complainants.

Messrs. A. L. Davenport, J. B. Dawkins, Monroe, Louisiana; Gaston L. Porterie, J. C. Daspit, Fred A. Blanche, E. L. Richardson, Baton Rouge, Louisiana, for Respondents.

Before Foster, Circuit Judge, and Dawkins and Borah, District Judges.

DAWKINS, *D. J.:*

The issues in this case have been stated in opinions heretofore handed down on the application for preliminary injunction.

On the original hearing a preliminary writ was granted on the finding that the statute assailed violated provisions of both the State and Federal Constitutions. Shortly thereafter, the State Supreme Court sustained its constitutionality under the State Law and a rehearing was promptly granted by this Court. On the rehearing a preliminary injunction was issued for the reason we concluded the Act in question infringed the commerce clause of the Federal Constitution. The case has now been submitted on the merits.

The evidence before us is the same, except that respondent has offered additional affidavits to show the mechanical operation of the compressor station and its accessories,

together with expert opinions of the witnesses as to the effects. The purpose was to sustain the contention of respondent that there is a distinct operation amounting to a manufacture of mechanical power before it is used to force the gas through the pipe lines and to thereby demonstrate that the case is parallel to that of Utah Power & Light Co. *v.* Pfost, 286 U. S. 165, in which a similar tax was sustained. The further contention is made by defendant from these facts that the gas does not enter the stream of interstate commerce until it passes through the condensers into the twenty inch pipe line through which it is conveyed to points of sale in the States of Texas and Arkansas. There is no dispute as to the physical or mechanical nature of these operations, and we find these additional facts as described by the witnesses without, however, accepting the conclusions or opinions which they advance as to effect.

As the name indicates, the plaintiff's business is one of transporting natural gas by pipe line more than 96% of which is done in interstate commerce, as conclusively as if it operated tank cars in transporting the kindred mineral, crude oil, into the other states for sale. Naturally, gas not being susceptible of commercial transportation by the latter method, it has to be pumped through pipe lines. In conducting its business, plaintiff has the right to use as a part thereof all of the usual accessories and instrumentalities reasonably incident to its operation. See Norfolk & Western R. R. Co. *v.* Pennsylvania, 136 U. S. 114; Ozark Pipe Line v. Monier, 266 U. S. 555. It would seem, therefore, that it is entitled to use its compressor stations as a part of this business, free from improper State interference, equally with its pipe line. It was clearly held in Tax Commission of Mississippi *v.* Interstate Gas Company, 284 U. S. 41, that a similar excise tax could not be imposed based upon the size and mileage of the pipe line used in interstate commerce.

Does the plaintiff have any business or is it engaged commercially in doing anything other than transporting natural gas drawn from its own wells plus what it buys from others, 96% of which passes into and is sold in other States? If so, then under the doctrine of Utah Power Company *v.* Pfost, *supra*, that business or commercial operation, we think may

be taxed. The operation of its internal combustion engines is for the sole purpose of applying their power to the gas in drawing it from the wells through the gathering lines and forcing it through the main line to its destination outside of the State, just as the energy created by the burning of coal or oil in a locomotive furnishes the power to pull tank cars over a line of railroad. In the Utah Power Company case, it was shown that the tax-payer owned and operated a large power plant, in which, by applying the energy of falling water to a complete system of machines and accessories, a different valuable article of commerce was produced, to-wit, electric power. It was this article or commodity so manufactured and produced which was conveyed over its lines. On the other hand, the plaintiff takes a natural product of the earth, and, except for passing it through machines for the elimination of refuse and impurities, by the same force, transports it from the wells into other States. The power produced or created by the mechanical operation of its internal combustion engines is exclusively for that purpose. None of it is sold or transported as such away from the point of its production. The distinction, we think, is made clear by the following expression of the Supreme Court in the cited case:

> "We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce. Appellant's chief engineer, although testifying that generation is a part of the process of transferring energy, said on cross-examination that in the process of generation there is a 'conversion of mechanical energy in the turbine shaft into a different form of energy, that is electrical energy. It must be converted into electrical energy before it can be transmitted. * * * This process of transformation is complete at the generator, and you have a greater amount of energy there, capable of doing a

greater amount of mechanical work, at the generator than you do after transmitting it into Utah.' The evidence amply sustains the conclusion that this transformation must take place as a prerequisite to the use of the electrical product, and that the process of transferring, as distinguished from that of producing, the electrical energy, begins not at the water fall, but definitely at the generator, at which point measuring appliances can be placed and the quantum of electrical energy ascertained with practical accuracy."

Utah Power & Light Company v. Pfost, 286 U. S. 180.

Our conclusion is that the attempted assimilation is metaphysical and that the business or operation cannot be dissected or torn apart so as to make of it distinct entities for the purpose of taxation, but that it must be treated as a unit and that entire unit is engaged almost exclusively in interstate commerce.

Passing now to the alternative contention of respondent, *i. e.*, that notwithstanding the engines may be instrumentalities of interstate commerce, they may nevertheless be taxed as here undertaken. It is well settled that a State may levy taxes which indirectly affect such commerce, such as *ad valorem* taxes upon the physical property situated therein, franchise taxes, occupational or license taxes, and on the net profits of a business part of which was derived from interstate commerce. Property physically in and having its situs within the State receives the same benefits of protection from its laws, whether used in one class of commerce or the other, and may be taxed accordingly where there is no discrimination. In similar fashion, a corporation doing business within the State and for the same reasons may be required to pay franchise taxes. So, too, may corporations or individuals, engaged in interstate commerce, be taxed for the privilege of carrying on their business or pursuing their occupations where they have a domicile or business situs in the State. However, all of these are indirect taxes, since they do not bear immediately upon the commerce itself or the instrumentalities by which it is car-

ried on. On the other hand, wherever and whenever a tax has been laid upon objects or articles passing in interstate commerce, or the instrumentalities or agencies by which it is carried on, the same has been held beyond State power under the commerce clause of the Federal Constitution. See cases cited and discussed in Helson & Randolph *v.* Kentucky, 279 Fed. 245. This case cites and quotes with approval from that of Minot *v.* Philadelphia, Western & B. R. R. Co. (No. 9645), 17 Fed. Cas. 458, in which the State of Delaware had imposed an excise or privilege tax requiring that "every railroad incorporated by the State, and doing business therein, should, on the first day of January in each year thereafter, within thirty days from such time, pay to the State Treasurer a tax of One Hundred Dollars, for the use in the State of Delaware of each locomotive belonging in whole or in part to said Company, and at any time during the preceding year used by said Company, within the State of Delaware * * *", twenty-five dollars for each passenger car, and ten dollars for each freight car or truck used under the same circumstances. Mr. Justice Strong, sitting on Circuit, in sustaining the plea of unconstitutionality under the commerce clause, among other things, had this to say:

> "The remaining question is attended with more difficulty. I refer to the legality of the tax imposed by Section 3 of the act. That section exacts from the company the payment every year of a tax of one hundred dollars for the use in the state of each locomotive, owned in whole or in part by the company, and at any time during the preceding year used by the company, within the state. A similar tax, though less in amount, is imposed for the use in the state of each passenger, freight and truck car; for the use of the rolling stock generally. This is not a tax upon the property of the company, nor upon its franchise generally. It is not a tax upon the locomotives or the cars. It is called a tax upon their use in the state; but it seems to be rather a license fee exacted for the privilege of using rolling stock. Can such a burden be imposed? I have said the franchise can be taxed as

property, and that the property acquired or held under it is taxable; but it may be doubted whether such an exaction as this can be regarded as a tax either on the franchise or on the property of the company. Can the state, after having granted to the complainants the right to run locomotives in and through its territory freely, and also the right to use all the ordinary means of conveying freight and passengers, compel the payment of license fees for the use of those ordinary means of transportation, and that not for police purposes? Can it say to the grantee of this franchise, 'True, you have purchased the right to use locomotives and cars; but if you use them you shall pay an additional price'? And is not a license fee thus exacted an additional price? I do not propose, however, to answer these questions or to decide that such an exaction is or is not an impairing of the obligation of the contract between the company and the state, for, in my opinion, the law of the state that attempts to impose this tax or duty is invalid for other reasons.

In the statement of facts to which the parties have agreed, I find the following. It is agreed 'that much the larger portion of the locomotive engines, passenger cars, freight cars, and trucks, belonging to the Philadelphia, Wilmington & Baltimore Railroad Company, were used during the year 1869 (the year for which this tax is attempted to be collected) on the aforesaid main line of railroad of said company, extending from the City of Philadelphia, in the state of Pennsylvania, through the state of Delaware to the city of Baltimore, in the state of Maryland, and for the purpose of transporting persons and property in and by a continuous course of transportation through, from, and into the said state of Delaware; that a number of engines, passenger and freight cars, and trucks, were used during the said year, on the main line from Philadephia to a point about a mile beyond Wilmington, and thence on the line of railroad known as the 'Peninsular Lines', extending through Delaware and a part of the eastern shore of Maryland to Crisfield, and the several

branches therefrom, and that very few of either the engines, cars, or trucks, of the said company, were used exclusively within the state of Delaware during the year 1869.'

It is, therefore, admitted, that the tax or license fee is laid upon the use of locomotives, cars, etc., mainly employed in transporting persons or property through the state from other states, or into it, or out of it. Such an imposition is, in my opinion, a regulation of commerce between states. It is a prescription that passengers and merchandise shall not be carried through the state except upon certain conditions. If the tax can be imposed at all, it may be to any extent. It has often been said that when a right to tax exists it is unlimited by anything but the discretion of the legislature that imposes it. This, of course, is to be understood as applying only to cases where the state has not by contract restricted its power. Said Chief Justice Marshall, in McCullough *v.* Maryland, 4 Wheat. (17 U. S.) 316: "An unlimited power to tax involves necessarily a power to destroy, because there is a limit beyond which no institution and no property can bear taxation. A question of constitutional power can hardly be made to depend on a question of more or less. If the states may tax, they have no limit but their discretion, and the bank must, therefore, depend on the discretion of the state for existence.' If this is so, the power to tax the use of all means or instruments of conveyance of persons or property through the state is the same as a power to prevent such use entirely. There is only a difference in the extent of its exercise.

* * * * * * *

I need hardly say, that a tax upon the ordinary and lawful means of transportation is practically a tax upon the thing transported.

* * * * * * *

Surely passage and transportation through a state are of this nature. If not, it is unfortunate. It is

of national importance that in regard to such objects there should be but one regulating power, for if one state can directly tax persons and property passing through it, or indirectly, by taxing the use of means of transportation, every other may; thus commercial intercourse between states remote from each other may be destroyed. The produce of Western states may be effectually excluded from Eastern markets; for though it might bear the imposition of a tax by one state it would be crushed under the weight of many."

If the respondent in this case can impose a tax based upon the horse power of the engines used in propelling the gas from one state to another, there is no limit upon its amount except legislative direction, so long as there is no discrimination. Many pipe lines, as illustrated by the one from the gas fields in the Panhandle of Texas to Chicago, pass through several states and the transportation of the gas is made possible by the use of these compressor stations. If the State where the commodity or shipment originates can impose such a burden upon those instrumentalities, we can see no logical reason why the other states, through which the gas passes en route to its destination, and in which it may be necessary to construct similar pumping or "booster" stations, may not impose similar taxes in their discretion. So that, by the time the gas reaches its destination, the cost to the consumer could be prohibitive. As the supply of natural gas in the country becomes exhausted, the desire of states in which it is produced to save it for use by its own citizens may tempt them to resort to appropriate expedients to prevent its being taken beyond their borders. That this will be attempted has already been demonstrated by the unsuccessful effort of West Virginia, in the case of Pennsylvania *v.* West Virginia, 262 U. S., 533. Should it be held that an excise tax may be validly laid upon the production of power used in such transportation, then the door is open to such abuse. We are compelled to say that the tax in this case is a direct burden upon the interstate commerce of the plaintiff and hence the section of the statute in question is con-

trary to the commerce clause of the Federal Constitution, in so far as it applies to plaintiff's business.

Since our decision on the application for preliminary injunction, the Supreme Court has handed down a number of opinions which we think clarify considerably, if they do not enlarge, the meaning of interstate commerce in its relation to business activities extending into more than one State. In Jones & Laughlin *v.* National Labor Relations Board, decided on April 12, 1937, the Act of July 5, 1935 (49 Stat., 29 U. S. C. 151), was upheld in so far as it applied to workers in the steel mills of the defendant. It is held that the business of defendant extending into many States was such that provisions of the Act of Congress in question, regulating the relations between employer and employee in interstate commerce, were applicable to employees of the appellant, although the work performed involved to some extent processes of manufacture. The Stockyards (Stafford *v.* Wallace, 258 U. S. 495) and Grain Futures (Minnesota *v.* Blassius, 290 U. S. 1) cases were cited as analagous, in that the products (ore and steel) of Jones & Laughlin, upon which labor was performed, were in effect in continuous passage from one State to another. In the present case the journey is actually continuous, although as is elsewhere stated herein, the gas passes through machines which extract refuse and other non-merchantable substances, as well as gasoline required by the State law. If the employees of the plaintiff in the present case, who operate the compressor stations, in the light of these latest decisions of the Supreme Court, can be said to perform their work in interstate commerce so as to be subject to the provisions of the Wagner Act, as to which there appears little room for doubt, then those instrumentalities actually used in propelling the gas through the main pipe lines into other States, would appear to be such a necessary and indispensable part of the plaintiff's business as to make a tax upon their use a direct burden upon interstate commerce. See also the Associated Press *v.* National Labor Relations Board; National Labor Relations Board *v.* Fruehauf Trailer Company; Washington-Virginia & Maryland Coach Company *v.* National Labor Relations Board;

and, National Labor Relations Board *v.* Friedman-Harry Marx Clothing Company, Inc., decided at the same sitting.

The writ of injunction should, therefore, be made permanent.

(Sgd.) RUFUS E. FOSTER,
Senior U. S. Circuit Judge, Fifth Circuit.

" BEN C. DAWKINS,
U. S. District Judge, Western District of Louisiana.

" WAYNE G. BORAH,
U. S. District Judge, Eastern District of Louisiana.

EXHIBIT "F".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION.

No. 615. In Equity.

ARKANSAS-LOUISIANA PIPE LINE COMPANY, *Complainant,*

vs.

MILTON COVERDALE, Sheriff and Tax Collector, *Respondent.*

The above numbered and entitled cause having been tried and submitted upon its merits, and the law and the evidence being in favor of the plaintiff and against the defendant, it is, therefore,

Ordered, Adjudged and Decreed that there be judgment in favor of the plaintiff, Arkansas-Louisiana Pipe Line Company, and against the defendant, Milton Coverdale, Sheriff and Tax Collector, permanently enjoining and prohibiting him from attempting to collect the horsepower tax upon the engines involved in this case, and from otherwise seizing or selling any of the property of the plaintiff in enforcement of said tax.

It is further Ordered, Adjudged and Decreed that the defendant pay all costs.

Done, Read and Signed on this the 22 day of May, A. D., 1937.

(Sgd.) RUFUS E. FOSTER,
Senior U. S. Circuit Judge, Fifth Circuit.

(Sgd.) BEN C. DAWKINS,
U. S. District Judge, Western District of Louisiana.

(Sgd.) WAYNE G. BORAH,
U. S. District Judge, Eastern District of Louisiana.

(1384)